

BARON & BUDD, P.C.
ROLAND TELLIS, SBN 186269
rtellis@baronbudd.com
MARK PIFKO, SBN 228412
mpifko@baronbudd.com
15910 Ventura Boulevard, Suite 1600
Encino, CA 91436
Telephone: 818.839.2333
Fax: 818.986.9698

Attorneys for Plaintiff
CLAIRE DELACRUZ individually, and
on behalf of other members of the public similarly situated

GIBSON, DUNN & CRUTCHER LLP
G. CHARLES NIERLICH, SBN 196611
gnierlich@gibsondunn.com
TIMOTHY W. LOOSE, SBN 241037
tloose@gibsondunn.com
MATTHEW L. BERDE, SBN 260615
mberde@gibsondunn.com
555 Mission Street, Suite 3000
San Francisco, CA 94105-2933
Telephone: 415.393.8200
Fax: 415.393.8306

Attorneys for Defendant
CYTOSPORT, INC., a California Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CLAIRE DELACRUZ, individually, and on
behalf of other members of the general public
similarly situated,

Plaintiff,

v.

CYTOSPORT, INC., a California
Corporation,

Defendant.

CASE NO.: 4:11-cv-03532-CW

**AMENDED ORDER PRELIMINARILY
APPROVING CLASS ACTION SETTLEMENT,
PROVISIONALLY CERTIFYING A
NATIONWIDE SETTLEMENT CLASS,
APPROVING PROPOSED NOTICE, AND
SCHEDULING FAIRNESS HEARING**

1 Upon review and consideration of the First Amended Settlement Agreement And Release, and
2 the attachments thereto (Dkt. No. 66), and the Plaintiff's Motion for Preliminary Approval (Dkt. No.
3 58), which have been filed with the Court, it is HEREBY ORDERED, ADJUDGED and DECREED
4 as follows:

5 1. The Court has carefully reviewed the First Amended Settlement Agreement And
6 Release, as well as the files, records, and proceedings to date in the Action. The definitions in the
7 First Amended Settlement Agreement And Release are hereby incorporated as though fully set forth
8 in this Order, and capitalized terms shall have the meanings attributed to them in the First Amended
9 Settlement Agreement And Release.

10 2. The parties have agreed to settle the Action upon the terms and conditions set forth in
11 the First Amended Settlement Agreement And Release, which has been filed with the Court. The
12 First Amended Settlement Agreement And Release, including all exhibits thereto, is preliminarily
13 approved as fair, reasonable, and adequate. Plaintiff in the Action, by and through her counsel, has
14 investigated the facts and law relating to the matters alleged in her complaint, including extensive
15 pretrial discovery, pretrial motions practice, legal research as to the sufficiency of the claims, and an
16 evaluation of the risks associated with continued litigation, trial, and/or appeal. The settlement was
17 reached as a result of extensive arm's length negotiations between counsel for Plaintiff, on the one
18 hand, and counsel for CytoSport, on the other hand, occurring over approximately one year and
19 multiple mediation sessions with two respected mediators—the Honorable Edward A. Panelli and the
20 Honorable Carl J. West, both currently affiliated with JAMS. The settlement confers substantial
21 benefits upon the Settlement Class, particularly in light of the damages that Plaintiff and Class
22 Counsel believe are potentially recoverable or provable at trial, without the costs, uncertainties,
23 delays, and other risks associated with continued litigation, trial, and/or appeal.

24 3. The Court conditionally certifies, for settlement purposes only: a class of all persons
25 who purchased one or more Muscle Milk® Ready-to-Drink beverages (the "RTD") and/or Muscle
26 Milk® bars (the "Bar," together with the RTD, the "Products") at retail in the United States from July
27 18, 2007 through December 31, 2012 (the "Settlement Class"). Excluded from the Settlement Class
28

1 are all persons who are employees, directors, officers, and/or agents of CytoSport or its subsidiaries
2 and affiliated companies, as well as the Court and its immediate family and staff.

3 4. The Court conditionally finds, for settlement purposes only and conditioned upon the
4 entry of this Order and the Final Order and Judgment that the prerequisites for a class action under
5 Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the
6 number of Settlement Class Members is so numerous that joinder of all members thereof is
7 impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims
8 of the Plaintiff are typical of the claims of the Settlement Class they seek to represent for purposes of
9 settlement; (d) the Plaintiff has fairly and adequately represented the interests of the Settlement Class
10 and will continue to do so, and the Plaintiff has retained experienced counsel to represent her; (e) for
11 purposes of settlement, the questions of law and fact common to the Settlement Class Members
12 predominate over any questions affecting any individual Settlement Class Member; and (f) for
13 purposes of settlement, a class action is superior to the other available methods for the fair and
14 efficient adjudication of the controversy. The Court also concludes that, because this Action is being
15 settled rather than litigated, the Court need not consider manageability issues that might be presented
16 by the trial of a nationwide class action involving the issues in this case. *See Amchem Prods., Inc. v.*
17 *Windsor*, 521 U.S. 591, 620 (1997). In making these findings, the Court has exercised its discretion
18 in conditionally certifying the Settlement Class on a nationwide basis. *See Hanlon v. Chrysler Corp.*,
19 150 F.3d 1011 (9th Cir. 1998).

20 5. The Court appoints the law firm of Baron & Budd, P.C. as counsel for the Class
21 (“Class Counsel”). For purposes of these settlement approval proceedings, the Court finds that this
22 law firm is competent and capable of exercising its responsibilities as Class Counsel. The Court
23 designates named Plaintiff Claire Delacruz as the representative of the Settlement Class.

24 6. The Final Fairness Hearing shall be held before this Court on May 15, 2014 at 2:00
25 p.m. to determine whether the First Amended Settlement Agreement And Release is fair, reasonable,
26 and adequate and should receive final approval. The Court will rule on Class Counsel’s application
27 for an award of attorneys’ fees, costs, and expenses (the “Fee Application”) at that time. Papers in
28 support of final approval of the First Amended Settlement Agreement And Release and the Fee

1 Application shall be filed with the Court according to the schedule set forth in Paragraph 15 below.
2 The Final Fairness Hearing may be postponed, adjourned, or continued by order of the Court. After
3 the Final Fairness Hearing, the Court may enter a Final Order and Judgment in accordance with the
4 First Amended Settlement Agreement And Release that will adjudicate the rights of the Settlement
5 Class Members (as defined in the Settlement Agreement And Release) with respect to the claims
6 being settled.

7 7. Pending the Final Fairness Hearing, all proceedings in the Action, other than
8 proceedings necessary to carry out or enforce the terms and conditions of the First Amended
9 Settlement Agreement And Release and this Order, are stayed.

10 8. The Court approves, as to form and content, the Long Form Notice and Summary
11 Notice, attached as Exhibits "D" and "E," respectively, to the First Amended Settlement Agreement
12 And Release. As soon as possible after the entry of this Order, but not later than December 12, 2013,
13 CytoSport will coordinate with the Settlement Administrator concerning notice to the Settlement
14 Class as follows:

15 (a) commencing publication on the Notice Date (as that term is defined in the First
16 Amended Settlement Agreement) of the Summary Notice in accordance with the plan of publication
17 described in Exhibit F to the Settlement Agreement; and, in addition, posting of the mutually agreed-
18 upon press release described in Exhibit F on the websites of both Class Counsel and Defendant.;

19 (b) providing a link in the Long Form Notice and the Summary Notice to a
20 settlement website to be designed and administered by the Settlement Administrator that will contain
21 the settlement documents (including but not limited to the Long Form Notice and the Claim Form), a
22 list of important dates, and any other information to which the parties may agree; and

23 (c) having the Settlement Administrator contact by email all of CytoSport's
24 customers who purchased the Products during the Class Period for whom CytoSport has valid email
25 addresses, to provide such customers with the Summary Notice.

26 9. The Court finds that the Long Form Notice and Summary Notice are reasonable, that
27 they constitute due, adequate, and sufficient notice to all persons entitled to receive notice, and that
28 they meet the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure.

Specifically, the Court finds that the manner of dissemination of the Long Form Notice and Summary Notice described in Paragraph 8 complies with Rule 23(e) of the Federal Rules of Civil Procedure as it is a reasonable manner of providing notice to those Settlement Class Members who would be bound by the settlement. The Court also finds that the manner of dissemination of the Long Form Notice and Summary Notice described in Paragraph 8 complies with Rule 23(c)(2), as it is also the best practicable notice under the circumstances, provides individual notice to all Settlement Class Members who can be identified through a reasonable effort, and is reasonably calculated, under all the circumstances, to apprise the members of the Settlement Class of the pendency of this Action, the terms of the settlement, and their right to object to the settlement or exclude themselves from the Settlement Class. *See, e.g., Farinella v. PayPal, Inc.*, 611 F. Supp. 2d 250, 256-57 (E.D.N.Y. 2009) (court approved plan disseminating notice by email, internet posting, and publication); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 145 (S.D.N.Y. 2008) (same); *see also Todd v. Retail Concepts, Inc.*, No. 07-0788, 2008 WL 3981593, at *2 (M.D. Tenn. Aug. 22, 2008) (court approved plan disseminating notice by email, in-store posting, and website posting).

10. Settlement Class Members will have until March 12, 2014, to submit their Claim Forms, which is due, adequate, and sufficient time.

11. Each Settlement Class member who wishes to be excluded from the Settlement Class and follows the procedures set forth in this Paragraph shall be excluded. Putative members of the Settlement Class who wish to opt out of the settlement must send a letter by fax, U.S. mail, or e-mail in the form specified in the First Amended Settlement Agreement And Release and Long Form Notice to: *Delacruz v. CytoSport c/o GCG*, P.O. Box 35069, Seattle, WA 98124-3508, postmarked (or the equivalent for fax or e-mail), with copies to Class Counsel and Defense Counsel, postmarked (or the equivalent for fax or e-mail) no later than March 12, 2014. All persons or entities who properly elect to opt out of the settlement shall not be Settlement Class Members and shall relinquish their rights to benefits with respect to the First Amended Settlement Agreement And Release, should it be approved.

12. Any member of the Settlement Class who has not timely submitted a written request for exclusion from the Settlement Class, and thus is a Settlement Class Member, may object to the

1 proposed settlement contained in the First Amended Settlement Agreement And Release, the
 2 certification of the Settlement Class, the entry of the Final Order and Judgment, the amount of fees
 3 requested by Class Counsel, and/or the amount of the incentive awards requested by the named
 4 Plaintiffs. Any Settlement Class Member who intends to object to the First Amended Settlement
 5 Agreement And Release must send a written objection by fax, U.S. mail, or e-mail to the Settlement
 6 Administrator, with copies to Class Counsel and Defense Counsel at the addresses set forth below,
 7 postmarked (or the equivalent for fax or e-mail) no later than March 12, 2014. Settlement Class
 8 Members who fail to file and serve timely written objections in the manner specified above shall be
 9 deemed to have waived all objections and shall be foreclosed from making any objection (whether by
 10 appeal or otherwise) to the settlement. No Settlement Class Member shall be entitled to be heard at
 11 the Final Fairness Hearing (whether individually or through separate counsel) or to object to the
 12 settlement, and no written objections or briefs submitted by any Settlement Class Member shall be
 13 received or considered by the Court at the Final Fairness Hearing, unless written notice of the
 14 objecting class member's intention to appear at the Final Fairness Hearing and copies of any written
 15 objections and/or briefs shall have been filed with the Court and served on Class Counsel and
 16 Defense Counsel by March 12, 2014. Settlement Class Members who object must set forth their full
 17 name, current address, and telephone number.

18 Settlement Administrator

19 *Delacruz v. CytoSport*
 20 c/o Garden City Group
 21 P.O. BOX 35069
 22 Seattle, WA 98124-3508

23 Counsel for the Class

24 Baron & Budd, P.C.
 25 Roland Tellis
 26 Mark Pifko
 27 15910 Ventura Boulevard, Suite 1600
 28 Encino, California 91436
 Telephone: 818.839.2333
 Facsimile: 818.986.9698
 E-mail: mpifko@baronandbudd.com

Counsel for CytoSport

Gibson, Dunn & Crutcher LLP
G. Charles Nierlich
Timothy W. Loose
Matthew L. Berde
555 Mission St., Suite 3000
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.393.8306
E-mail: mberde@gibsondunn.com

13. Class Counsel shall file their Fee Application on or before February 25, 2014.

14. Papers in support of final approval of the First Amended Settlement Agreement And Release, and in response to objections to the Settlement Agreement And Release or the Fee Application, shall be filed with the Court on or before April 11, 2014.

15. In summary, the dates of performance are as follows:

(a) The Notice Date shall occur on or before December 12, 2014 and the notice provided in accordance with Exhibit F to the First Amended Settlement Agreement shall be completed within 45 days thereafter;

(b) Settlement Class members may submit Claim Forms or may submit requests for exclusion postmarked no later than 90 days following the Notice Date;

(c) Class Counsel shall file their Fee Application on or before 75 days following the Notice Date;

(d) All objections to the First Amended Settlement Agreement And Release and written notices of the objecting class member's intention to appear at the Final Fairness Hearing shall be filed and served no later than 90 days following the Notice Date;

(e) Papers in support of final approval of the First Amended Settlement Agreement And Release, and in response to objections to the Settlement Agreement And Release or the Fee Application, shall be filed with the Court on or before 120 days following the Notice Date; and

(f) The Final Fairness Hearing shall be held on May 15, 2014 at 2:00 p.m.

1 16. These dates of performance may be extended by order of the Court, for good cause
2 shown, without further notice to the Settlement Class. Settlement Class Members must check the
3 settlement website at www.CytoSportSettlement.com regularly for updates and further details
4 regarding extensions of these dates of performance.

5 17. In the event the First Amended Settlement Agreement And Release is not approved by
6 the Court, or for any reason the parties fail to obtain a Final Order and Judgment as contemplated in
7 the First Amended Settlement Agreement And Release, or the First Amended Settlement Agreement
8 And Release is terminated pursuant to its terms for any reason, then the following shall apply:

9 (a) All orders and findings entered in connection with the Settlement Agreement
10 And Release shall become null and void and have no force and effect whatsoever, shall not be used or
11 referred to for any purposes whatsoever, and shall not be admissible or discoverable in this or any
12 other proceeding;

13 (b) The conditional certification of the Settlement Class pursuant to this Order
14 shall be vacated automatically, and the Actions shall proceed as though the Settlement Class had
15 never been certified pursuant to this First Amended Settlement Agreement And Release and such
16 findings had never been made;

17 (c) Nothing contained in this Order is, or may be construed as, a presumption,
18 concession or admission by or against CytoSport or Plaintiff of any default, liability or wrongdoing
19 as to any facts or claims alleged or asserted in the Action, or in any actions or proceedings, whether
20 civil, criminal or administrative;

21 (d) Nothing in this Order or pertaining to the First Amended Settlement
22 Agreement And Release, including any of the documents or statements generated or received
23 pursuant to the claims administration process, shall be used as evidence in any further proceeding in
24 this case; and

25 (e) All of the Court's prior Orders having nothing whatsoever to do with class
26 certification shall, subject to this Order, remain in force and effect.


27 18. Pending final determination of whether the proposed settlement should be approved,
28 no Settlement Class Member directly, derivatively, in a representative capacity, or in any other

1 capacity, shall commence or continue any action against any of the Released Parties (as that term is
2 defined in the First Amended Settlement Agreement And Release) in any court or tribunal asserting
3 any of the Released Claims (as that term is defined in the First Amended Settlement Agreement And
4 Release).

5 19. Garden City Group, Inc. is hereby appointed as Settlement Administrator for this
6 settlement and shall perform all of the duties of the Settlement Administrator set forth in the First
7 Amended Settlement Agreement And Release.

8 20. Class Counsel and Defense Counsel are hereby authorized to use all reasonable
9 procedures in connection with approval and administration of the settlement that are not materially
10 inconsistent with this Order or the First Amended Settlement Agreement And Release, including
11 making, without further approval of the Court, minor changes to the form or content of the Long
12 Form Notice, Summary Notice, and other exhibits that they jointly agree are reasonable or necessary.

13 IT IS SO ORDERED, this 18th day of November, 2013

14
15 
16 THE HONORABLE CLAUDIA WILKEN
17 UNITED STATES DISTRICT COURT JUDGE
18
19
20
21
22
23
24
25
26
27
28